No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WALTER BRYAN ASHLOCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court's holding in *Blakely v. Washington,* 124 S.Ct. 2531 (2004), compels the finding that the district court violated the Fifth and Sixth Amendment of the United States Constitution by increasing Petitioner Walter Bryan Ashlock's term of imprisonment based on factual findings that were not charged in the indictment, presented to his jury, proven beyond a reasonable doubt, or otherwise subject to the procedural protections afforded by the Constitution.

2. Whether the district court and appellate court departed from the standards for expert qualifications set out in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence with their rulings on the Government's "expert" evidence on drug testing.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Walter Bryan Ashlock ("Mr. Ashlock") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 105 Fed.Appx. 581 and is reproduced herein at Appendix A.[1] The denial of Mr. Ashlock's petition for rehearing *en banc* is reproduced at Appendix C.

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[1] Mr. Ashlock's Appendix will be cited herein as "App."

JURISDICTION

The court of appeals entered judgment on August 3, 2004. Mr. Ashlock filed a timely petition for rehearing *en banc* on August 27, 2004. The court of appeals denied the petition on September 21, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

I. U.S. CONST. amend. V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

II. U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation . . . .

STATEMENT OF THE CASE

Mr. Ashlock was tried before a jury under a five count indictment for: (1) Conspiracy to Possess with Intent to Distribute More than 500 Grams of a Mixture and Substance Containing a Detectable Amount of Methamphetamine, (2) Possession of Pseudoephedrine with Intent to Manufacture a Mixture and Substance Containing a Detectable Amount of Methamphetamine, (3) Felon in Possession of a Firearm, and (4) two counts for Possession with Intent to Distribute More than 50 Grams of a Mixture and Substance Containing a Detectable Amount of Methamphetamine. *See* Record on Appeal ("R."), Volume ("Vol.") 1, pp. 19-23.[2] The district

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[2] As permitted by Supreme Court Rule 12(7), Mr. Ashlock herein cites the Record on Appeal maintained by the clerk of the United States Court of Appeals for the Fifth Circuit.

court had jurisdiction over the trial proceedings under 18 U.S.C. § 3231, which grants exclusive jurisdiction over all offenses against the laws of the United States.

At Mr. Ashlock's trial, the Government constructed key components of its case on a foundation of improper evidence from purported experts on drug testing. The district court allowed this evidence, over Mr. Ashlock's repeated pre-trial and trial objections, although the purported experts did not comply with or satisfy *Daubert* standards or the standards set by Rule 702 of the Federal Rules of Evidence.

A jury convicted Mr. Ashlock on each count of the indictment. *See* R. Vol. 3, pp. 793-95; R. Vol. 12, Transcript ("Tr.") pp. 688-89. At the direction of the district court, the United States Probation Office for the Northern District of Texas (the "Probation Office") prepared a Presentence Investigation Report ("PSR") to guide the district court's imposition of sentence. *See* R. Vol. 12, Tr. p. 692. The Probation Office submitted the PSR on or about March 24, 2003 and submitted an Addendum to the PSR on or about April 18, 2003. *See* PSR at 22; Addendum to PSR at 11.[3] Mr. Ashlock objected to the PSR and Addendum because, *inter alia*, the Probation Office recommended an enhancement of Mr. Ashlock's sentence based on factual findings that had not been noticed, submitted to the jury, or proven beyond a reasonable doubt. *See* Ashlock's Objections to Presentence Report at 2, 4-6; Ashlock's Objections to the Addendum to the Presentence Report at 2, 4-6.[4]

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[3] The PSR and Addendum to PSR were not given separate page numbers for purposes of the Record on Appeal; accordingly, any reference to the PSR or Addendum will be directly to the page numbers in the documents.

[4] *See generally* n.3.

Before trial, Mr. Ashlock also had objected to any enhancement of his sentence based on facts not pleaded in the indictment, submitted to the jury, and proven beyond a reasonable doubt. In his pretrial objection, Mr. Ashlock cited the Fifth and Sixth Amendments to the United States Constitution and the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to establish that all "enhancement" facts had to be pleaded in the indictment and proven beyond a reasonable doubt. *See* Motion to Exclude Certain Evidence, Motion in Limine and Advance Notice of Difficult Questions, filed February 6, 2003.

Over Mr. Ashlock's objections, the district court did not require the indictment to be amended, did not require the facts allegedly warranting enhancement to be submitted to a jury, and ultimately accepted the following fact findings recommended by the Probation Office: (1) Mr. Ashlock allegedly created a substantial risk of harm to human life or the environment with his purported methamphetamine manufacturing activities (three point enhancement); (2) Mr. Ashlock allegedly obstructed justice by counseling his girlfriend not to cooperate with the prosecuting attorneys' investigation (two point enhancement); (3) Mr. Ashlock allegedly obstructed justice by fleeing from police officers in a vehicle chase that purportedly created substantial risk of bodily injury (two point enhancement); and (4) Mr. Ashlock allegedly possessed a weapon in connection with a drug trafficking crime (two point enhancement). *See generally* R. Vol. 3, pp. 807-12; R. Vol. 13, Tr. pp. 4, 8-11.

Based on these fact-findings adopted by the court, it enhanced Mr. Ashlock's sentence by nine points from offense level 36 to offense level 45. The district court then sentenced Mr. Ashlock to the following terms of imprisonment: (1) a term of life on count 1 of the indictment, (2) a term of twenty years on count 2 of the indictment, (3) a term of ten years on

count 3 of the indictment, (4) a term of forty years on count 4 of the indictment, and (5) a term of forty years on count 5 of the indictment. R. Vol. 3, pp. 807-12; R. Vol. 13, Tr. pp. 4, 8-11. If Mr. Ashlock's offense level had not been unconstitutionally enhanced from 36 to 45 points, the maximum term of imprisonment that could have been imposed under the United States Sentencing Guidelines ("USSG") would have been 33 years. Instead, by virtue of the improper enhancements, the maximum term of imprisonment increased to life in prison. The court sentenced Mr. Ashlock to life in prison.

Pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, Mr. Ashlock appealed the district court's pretrial and trial rulings and the court's illegal imposition of sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the district court's judgment and sentence. *See* App. A, p. 16a. Mr. Ashlock herein seeks review of the Fifth Circuit's ruling.

REASONS FOR ALLOWANCE OF THE WRIT

The Court should allow Mr. Ashlock's writ with respect to his unconstitutional sentence because: (1) the constitutionality of federal sentencing practices is an important issue of law that has not been resolved by this Court, and (2) there is a split in the circuits regarding the constitutionality of federal sentencing practices. The Court should allow Mr. Ashlock's writ with respect to the expert standards in *Daubert* and Rule 702 because the Fifth Circuit's construction of these standards is not consistent with the letter or spirit of relevant decisions of this Court or the provisions of Rule 702.

I. THIS COURT'S HOLDING IN *BLAKELY V. WASHINGTON* PRESAGES THAT FEDERAL SENTENCING PRACTICES ARE UNCONSTITUTIONAL

This Court's holding in *Blakely v. Washington* provides a clear signal that federal sentencing courts violate the notice and jury trial provisions of the Fifth and Sixth Amendment of the Constitution when the courts enhance a criminal defendant's term of imprisonment based on facts that are not included in the indictment, submitted to a jury, or proven beyond a reasonable doubt. Historically, the circuit courts have allowed this practice, and the judicial endorsement of the practice most significantly stemmed from the following language in this Court's holding in *Apprendi v. New Jersey*: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . ." 530 U.S. at 490. Federal courts historically interpreted this holding as follows: "The decision in *Apprendi* was specifically limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court's factual finding for the purposes of determining the applicable Sentencing Guidelines." *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000).[5]

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[5] *See also United States v. Baltas*, 236 F.3d 27, 40-41 (1st Cir. 2001); *United States v. Williams*, 235 F.3d 858, 863-64 (3rd Cir. 2000); *United States v. Kinter*, 235 F.3d 192, 199-200 (4th Cir. 2000); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 932-33 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Heckard*, 238 F.3d 1222, 1235-36 (10th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 829 n. 3 (11th Cir. 2000); *In re Sealed Case*, 246 F.3d 696, 698-99 (D.C.Cir. 2001).

A. The significance of the *Blakely* opinion

Blakely foretells a profound shift in how federal sentencing courts now should apply *Apprendi* considerations when imposing sentences under the USSG. *Blakely* reveals that the "maximum" sentence referenced in *Apprendi* was not merely intended to embrace the maximum penalty set forth in federal criminal statutes, but also the maximum range of imprisonment contemplated by the sentencing scheme under the USSG.

Accordingly, under *Blakely*, any time a criminal defendant's term of imprisonment is increased beyond the "maximum" range of imprisonment authorized by the applicable sentencing guideline, regardless of the maximum range of imprisonment authorized by an underlying criminal statute, the facts on which the imprisonment range is increased must be pleaded in the indictment, presented to a jury, and proven beyond a reasonable doubt. Mr. Ashlock's sentence was increased without regard to these procedural protections, which was inappropriate under the following holding in *Blakely*:

> Our precedents make clear . . . that the "statutory maximum" . . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* . . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

124 S.Ct at 2537(emphasis in original) (citations omitted).

B. This Court's reasoning in *Blakely* should extend to current federal sentencing practices

Review of the unconstitutional sentencing scheme at issue in *Blakely* illustrates the invalidity of current federal sentencing practices. The defendant in *Blakely* pleaded guilty to

second-degree kidnapping, domestic violence, and possession of a firearm in violation of Washington state law. *See* 124 S.Ct at 2534-35. With respect to the second-degree kidnapping count, the controlling Washington criminal statute generally established a ten-year maximum term of imprisonment. *Id.* at 2535. Other provisions of Washington law further limited, however, the maximum term of imprisonment that a judge actually could impose for a second-degree kidnapping conviction. *Id.* The maximum term for second-degree kidnapping thus depended on the state's sentencing laws. *Id.* Those laws dictated Blakely's "standard range" of imprisonment should have been 49 to 53 months. *Id.*

This range was calculated by determining the seriousness of the second-degree kidnapping offense, which was rated at a seriousness level of V (five), and by determining an offender score for Blakely, which was determined to be rated at level 2. *Id.* The Washington court then used the intersection of the level V "serious rating" and level 2 "offender score" to identify an initial standard range of imprisonment of 13 to 17 months. *Id.* Blakely's range of imprisonment then was enhanced because he pleaded guilty to a charge of possession of a firearm, and under Washington law, this resulted in a 36-month enhancement; hence the standard range of imprisonment increased to 49 to 53 months. *Id.* Significantly, this enhancement was not based on the trial judge's independent fact finding; it was based on Blakely's plea admission that he possessed a firearm. *Id.*[6]

After the trial judge calculated Blakely's range of imprisonment at 49 to 53 months, he further enhanced Blakely's term of imprisonment to 90 months based on the uncharged

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[6] Blakely's plea to firearm possession had the same force and effect that a jury finding on this issue would have had. *See* 124 S.Ct. at 2537 (referencing the equivalent significance of a jury verdict and a defendant's plea admission).

and unproven "fact" that Blakely had engaged in "deliberate cruelty" in the manner that he carried out the subject kidnapping. 124 S. Ct. at 2537. Blakely did not admit to any such "deliberate cruelty," and this purported "fact" therefore did not have the force and effect of a jury's factual finding. *Id.* The trial judge nevertheless enhanced Blakely's sentence based on this unpleaded and unproven fact. *Id.* This Court determined that the enhancement based on the trial judge's factual findings was unconstitutional.

The procedure used by the trial court in Blakely's sentence calculation is substantially similar to the procedure by which Mr. Ashlock's sentence was calculated under the federal sentencing scheme. For instance, the "seriousness level" and "offender level" concepts under the Washington scheme are strikingly similar (if not identical in operation) to the USSG's use of an intersecting "offense level" and "Criminal History Category" to identify a defendant's appropriate sentencing range. *See generally* USSG Sentencing Table. Also, Mr. Ashlock was convicted on Count I of the indictment for conspiracy to manufacture and to possess with the intent to distribute and to distribute in excess of five hundred grams or more of a mixture or substance containing a detectable amount of methamphetamine, in purported violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). The statutory maximum term of imprisonment for this offense is life imprisonment. *See* 21 U.S.C. § 841(b)(1)(vii). As was the case in *Blakely*, the controlling sentencing guidelines further limit, however, the actual maximum range of imprisonment a judge can impose for violation of sections 841(a)(1) and (b)(1)(A). *See generally* USSG § 2D1.1(c)(2). Consequently, as in *Blakely*, it is the maximum term under the USSG, not the maximum term set out in the offense statutes, which constitutes the "statutory maximum" that cannot be exceeded by a sentencing judge absent jury findings.

In *Blakely*, this Court articulated the sentiment as follows:

> The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies . . . . It observes that no exceptional sentence may exceed that [10-year] limit. . . . Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," . . . and the judge exceeds his proper authority.
>
> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. . . . Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed . . . . The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in [*Ring v. Arizona*, 536 U.S. 584 (2002)] (because that is what the judge could have imposed upon finding an aggravator).

124 S.Ct. at 2527-38 (emphasis in original) (citations omitted).

Mr. Ashlock's sentence should have been based on only those facts charged in the indictment and on a sentencing guideline calculation that corresponded with the appropriate offense level for the crime the jury actually found him guilty. The sentence should not have been calculated based on additional factual considerations beyond those in the indictment and presented to the jury.

The district court nevertheless used Mr. Ashlock's improperly enhanced sentence level, coordinated it with Mr. Ashlock's Criminal History Category, and imposed an enhanced sentence. This procedure is precisely the procedure, without material variation, that the Washington court used when it sentenced Blakely. Accordingly, just as the sentence enhancements in *Blakely* were unconstitutional, Mr. Ashlock's sentencing enhancements are unconstitutional.

C. The Fifth Circuit's failure to apply *Blakely* warrants allowance of the writ

In this case, the Fifth Circuit declined to extend the reasoning in *Blakely* to invalidate federal sentencing practices under the USSG. *See* App. A, p. 16a (referencing its holding in *United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004)).[7] Even so, the court has acknowledged the considerable uncertainty that remains regarding the validity of federal sentencing practices in light of *Blakely*:

> In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty . . . .

Pineiro, 377 F.3d at 473. Accordingly, the Fifth Circuit, by its own admission, has decided an important question of federal law that has not been, but should be, settled by this Court.

Furthermore, the Fifth Circuit's holding in *Pineiro* is at odds with, at least, holdings form the United States Courts of Appeal for the Ninth and Seventh Circuits. *See United States v. Ameline*, 376 F.3d 967, 980 (9th Cir. 2004); *United States*

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[7] A copy of the *Pineiro* opinion is attached herein at App. B.

v. Booker, 375 F.3d 508, 515 (7th Cir. 2004).[8] Accordingly, the conflict between the circuits on this important point of law warrants resolution by this Court.

II. THE FIFTH CIRCUIT HAS NOT FOLLOWED THE STANDARDS FOR EXPERT TESTIMONY ESTABLISHED BY THIS COURT'S HOLDING IN *DAUBERT* OR RULE 702

At trial, the Government's "experts" failed to satisfy the standards established by *Daubert*, its progeny, and Rule 702. The district court nevertheless admitted the Government's expert testimony pursuant to a liberalized and relaxed characterization of this Court's *Daubert* standards. The Fifth Circuit affirmed this practice.

This Court, in *Daubert*, established the framework for determining whether expert testimony is admissible under Rule 702 of the Federal Rules of Evidence. The Fifth Circuit has articulated this framework as follows: "Under *Daubert*, Rule 702 charges trial courts to act as 'gate-keepers' making a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue.'" *U.S. v. Tucker*, 345 F.3d 320, 327 (5th Cir. 2003). In order to be admissible, both under *Daubert* and Rule 702, expert testimony must be both "relevant and reliable." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002); *Daubert*, 509 U.S. at 589; FED. R. EVID. 702. It is now well settled *Daubert* considerations apply to all species of expert testimony, whether based on "scientific, technical, or other specialized knowledge." *See*

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[8] In an *en banc* decision issued on July 12, 2004, the Second Circuit also certified three *Blakely* questions to the Supreme Court. *See U.S. v. Penaranda*, 375 F.3d 238 (2nd Cir. 2004).

FED R. EVID. 702; *see also Pipitone*, 288 F.3d at 244 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)).

Performing complex laboratory procedures is the epitome of an undertaking that requires scientific, technical, and specialized knowledge. At trial, the Government offered testimony and evidence related to complex scientific procedures run by Government witness who testified regarding purported drug quantities and characteristics. Neither the Government nor its expert witnesses offered any explanation concerning the selection of the procedures, the methodology used to perform the procedures, or whether the methods were performed properly. The information provided by the Government did not include either sufficient data or an application of the principles and methods used to the facts of the case, and none of the Government's summaries provided to Mr. Ashlock included any methodology or explanation for the tests run, the opinions reached, or how the methodologies were applied properly to the facts in the case.

It is not enough for a purported expert to simply take a "just take my word for it" approach to demonstrating that proposed testimony is relevant and reliable in accordance with the standards of *Daubert* and Rule 702 of the Federal Rules of Evidence. *See* FED. R. EVID. 702 cmt. 2000 Amendments (quoting *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)). The Government's failure to proffer required materials or elicit information to support the testimony and evidence from their expert witnesses renders that testimony and evidence a nullity.

The district court consequently erred by allowing the Government's three purported laboratory experts, Ms. Cheryl White, Mr. Christopher Youngkin, and Mr. Drew Fout, to give opinions that substances they purportedly tested were methamphetamine. None of the experts satisfied the standard of Rule 702 requiring expert evidence to be reliable and

relevant. None of the experts satisfied the standards set forth by this Court in *Daubert* and its progeny. Absent reliable and relevant expert evidence on the analysis of alleged controlled substances, the Government's case against Mr. Ashlock fails, and the district court and Fifth Circuit's rulings on the expert testimony and evidence signals a drastic shift from the mandates of *Daubert* and Rule 702.

A. Cheryl White's testimony was improper

Cheryl White testified as the Government's primary laboratory expert. R. Vol. 11, Tr. p. 527. Ms. White testified in order to reach her conclusions that certain substances analyzed contained methamphetamine or pseudoephedrine, she ran a series of scientific laboratory procedures, including: Fourier Transform Infrared Spectrophotometry, Gas Chromatography, Mass Spectrometry, Infrared Spectrophotometry, High Pressure Liquid Chromatography, pH, Color Test, Flame Test, and Logo Index Search. R. Vol. 11, Tr. pp. 528-30, 532, 534-36. Ms. White never explained the methodology used to run any of the complex scientific procedures she used to determine substances were methamphetamine or pseudoephedrine.

Ms. White was the sponsor of at least thirteen exhibits purporting to establish certain substances were either pseudoephedrine or methamphetamine. Ms. White's testimony was riddled with inadequacies and omissions. With respect to her calculation of pseudoephedrine, a "starter" chemical for methamphetamine, Ms. White acknowledged by using her "theoretical yield" she was not going to calculate a "true value" of the amount of the drug. R. Vol. 12, Tr. pp. 607-09. She also acknowledged she used a 100% theoretical yield, instead of a real yield, "because it's DEA policy." R. Vol. 12, Tr. p. 609. Her theoretical yield testimony, she admitted, would never be accurate or a "reality." R. Vol. 12, p. 608.

Ms. White acknowledged her work was not performed in connection with any scientific study. R. Vol. 12, p. 611. She acknowledged it had not been published. *Id.* She acknowledged her opinions had not been subjected to outside peer review (other than submitting them to the U.S. Attorney's Office). *Id.* She admitted all of the work she had performed was "performed solely for the purposes of this litigation." *Id.*

Nowhere in her testimony or opinions did Ms. White explain the definition of Pseudoephedrine HCL, a chemical relevant to several procedures she performed. R. Vol. 12, Tr. pp. 588-89. She did not explain the meaning of D-methamphetamine HCL, also relevant to several procedures she performed. R. Vol. 12, Tr. p. 590. Ms. White acknowledged the jury could not know how she obtained certain results. *Id.* She never defined the term "quantitative result." *Id.* She never explained how to perform or interpret any of the scientific tests she ran. R. Vol. 12, Tr. pp. 589-91. She never defined the terms "active ingredient" or "laboratory sample." R. Vol. 12, Tr. p. 592. She acknowledged she never defined D-methamphetamine. *Id.* She never testified concerning the distinction between D-methamphetamine and D-methamphetamine HCL. R. Vol. 12, Tr. p. 592-93. She failed to explain anything about the variables used to run the scientific tests she performed. R. Vol. 12, Tr. p. 593. She never explained how the machines used to run the tests were calibrated. R. Vol. 12, Tr. p. 593. She acknowledged no one other than a chemist could look at the test results and know what they mean. R. Vol. 12, Tr. p. 594.[9] She acknowledged the jury could not know how she had run tests from the information provided with her opinions. R. Vol. 12, Tr. p. 595.[10] In discussing her opinions she was asked whether "we

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[9] This is precisely the type of disturbing "take my word for it" testimony that is impermissible under *Daubert* and Rule 702.

[10] *See* n.9.

should accept this as true because it's on a standard [DEA] form;" Ms. White answered "Yes." R. Vol. 12, Tr. p. 599.

It is upon Ms. White's conclusions, along with the other laboratory experts' conclusions, that the Government based its evidence that the substances found near or in the possession of Mr. Ashlock were controlled substances. Her testimony fails, however, to satisfy *Daubert*; it fails to satisfy the three-prong test of Rule 702 that expert evidence be based on sufficient facts or data, that the testimony be the product of reliable principles and methods, and that the principles and methods applied by the expert be applied reliably to the facts of the case. Instead, Ms. White offered merely "*ipse dixit*" to bear out the purported connection between her testing and sound scientific procedures and methodology. Despite clear authority from this Court and the provisions of Rule 702 that testimony based on such unreliable grounds is not admissible, the district court and Fifth Circuit nevertheless ruled the Government had no further burden to establish the admissibility of Ms. White's purported expert testimony. This practice liberalizes and relaxes this Court's *Daubert* standards to the point where courts are not adopting a flexible approach to accessing the admissibility of expert testimony, as they are entitled to, but abdicating their obligation to serve as gatekeepers that make a preliminary assessment of whether the reasoning or methodology underlying testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts of a case. This reflects an unwarranted shift from the spirit and letter of *Daubert*, its progeny, and Rule 702.

B. Chris Youngkin's testimony was improper

Chris Youngkin, a criminalist for the Texas Department of Public Safety Crime Laboratory in Garland, Texas, testified several substances contained methamphetamine. Mr. Youngkin acknowledged he did not take any steps to verify or

corroborate the results of his tests. R. Vol. 9, Tr. p. 93. He testified he did not know the exact amount of methamphetamine contained in the three samples he analyzed. R. Vol. 9, Tr. p. 96. He could not or did not explain why he selected necessary reagents for his tests, a substance essential for proper testing procedures. R. Vol. 9, Tr. p. 98. Mr. Youngkin testified selection of reagents was really based upon "just the way I was trained." R. Vol. 9, Tr. p. 102-03.

Mr. Youngkin acknowledged the American Society of Crime Laboratories requires certain number of tests to be run to validate or corroborate the determination that a substance is methamphetamine. R. Vol. 9, Tr. p. 103. Mr. Youngkin confirmed one of his confirmatory tests does not even determine methamphetamine is present—it only gives an indication methamphetamine may be present. R. Vol. 9, Tr. p. 103. As to another of the tests, the Marquis Test, it only indicated "methamphetamine could be present." R. Vol. 9, Tr. p. 104. Mr. Youngkin acknowledged the substance "also could be antihistamines." R. Vol. 9, Tr. p. 104. Mr. Youngkin acknowledged he had not explained how any of his procedures were run. R. Vol. 9, Tr. p. 108. He confirmed his report did not walk through the steps or methodologies used to reach the conclusion the substances were methamphetamine. *Id.*; R. Vol. 9, Tr. p. 113.[11] This information was not provided to the jury at trial. Mr. Youngkin acknowledged he did not determine any rate of error for his activities. R. Vol. 9, Tr. p. 112. He acknowledged there was a procedures manual at the laboratory containing the methodologies used to run the various tests, but relevant information from the manual was not included in his report or other materials provided by the Government. R. Vol. 9, Tr. p. 114.

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[11] *See* n.9.

Clearly, Mr. Youngkin's testimony does not satisfy the standards of *Daubert* or Rule 702. The Government failed to provide any information concerning the methodologies he used to determine certain substances purportedly were methamphetamine, and there is no explanation of the application of any methodology to the facts of this case. The district court, contrary to its appropriate role as gatekeeper, ruled that the Government had no further burden to establish the admissibility of Mr. Youngkin's purported expert testimony, and the Fifth Circuit affirmed. This practice likewise signals a departure from this Court's *Daubert* standards and the standards contemplated under Rule 702.

C. Drew Fout's testimony was improper

Mr. Fout works at the Department of Public Safety Laboratory in Garland, Texas as a criminalist and drug analyst. R. Vol. 10, Tr. pp. 243-44. Mr. Fout analyzed materials, which were obtained in connection with the arrest of Mr. Ashlock. R. Vol. 10, Tr. p. 246. Mr. Fout performed both a color test and a UV (ultraviolet light) analysis in his evaluation of the substances that allegedly contained methamphetamine. R. Vol. 10, Tr. pp. 247, 248. He did not explain how his test results revealed the presence of methamphetamine.

He acknowledged in running the color test and the UV analysis, the use of a different reagent might yield different results. R. Vol. 10, Tr. p. 251. He nevertheless did not explain his methodology for selecting the reagents he used. He acknowledged the operations manual at the laboratory contained methodologies for the tests he ran. R. Vol. 10, Tr. p. 252. He confirmed none of the information in the laboratory manual was included in his "expert" report. *Id.* He agreed he did not explain how he interpreted his results. R. Vol. 10, Tr. p. 255. Nor did he reveal the method used to interpret his results. *Id.* He acknowledged he had not

calculated any rate of error. R. Vol. 10, Tr. p. 255. He acknowledged his "expert evidence" did not reflect anything more than underlying data, with no methodology or procedure. R. Vol. 10, Tr. p. 257.[12] Mr. Fout never explained how he determined the presence of chemicals and compounds, which were fundamental to his finding of methamphetamine. He did not reveal his method for extrapolating methamphetamine from other substances.

Mr. Fout's testimony, like the remainder of the Government's purported expert testimony and laboratory evidence, failed to satisfy the requirements of *Daubert* and Rule 702 of the Federal Rules of Evidence. The testimony and evidence should have been excluded prior to trial and at trial.[13]

The district court and Fifth Circuit nevertheless disregarded this Court's standard for expert qualifications and permitted the testimony and evidence. The Government's failure to prove at trial how its scientific tests were performed, the methodology behind them, or the bases for the opinions of its experts implicates serious legal issues regarding the extent of flexibility district and reviewing courts have to depart from established *Daubert* considerations to allow purported expert testimony. The limits on such flexibility have not been sufficiently defined to prevent district courts, as was the case here, from so relaxing the

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[12] *See* n.9.

[13] Mr. Ashlock's objections to the expert testimony and evidence is reflected in the Record on Appeal as follows: Exhibit 244 (R. Vol. 11, Tr. pp. 528-529); Exhibit 248 (R. Vol. 11, Tr. p. 531); Exhibit 249 (R. Vol. 11, Tr. pp. 531-532); Exhibit 250 (R. Vol. 11, Tr. p. 534); Exhibit 251 (R. Vol. 11, Tr. p. 535); Exhibit 333 (R. Vol. 11, Tr. p. 536); Exhibit 334 (R. Vol. 11, Tr. p. 538); Exhibit 335 (R. Vol. 11, Tr. p. 539); Exhibit 335.1—running objection (R. Vol. 11, Tr. p. 540); Exhibit 336—running objection (R. Vol. 11, Tr. p. 540); Exhibit 346 – running objection (R. Vol. 11, Tr. p. 540); R. Vol. 9, Tr. p. 80; R. Vol. 10, Tr. p. 257.

Daubert standards and departing from the evidentiary protections contemplated by the standards, that the standards effectively are eroded. Ms. White, in her testimony, vividly illustrates this point and exemplifies what *Daubert* and Rule 702 seek to prevent when she answered the question whether "we should accept [her results] as true because it's on a standard [DEA] form," by responding, "yes." *See* R Vol. 4, Tr. p. 599. *Daubert* and Rule 702 require proof of experts' methodologies, and much more than Government witnesses saying simply: "These are the tests I ran. These tests are generally accepted. Believe me." The Fifth Circuit's holding in this case nevertheless invites testimony of the kind from expert witnesses; accordingly, review is appropriate to further delineate the acceptable contours of the *Daubert* standard and Rule 702 of the Federal Rules of Evidence.

CONCLUSION

For the foregoing reasons, Petitioner Walter Bryan Ashlock respectfully requests the Court grant this writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[August 3, 2004]

No. 03-10615

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WALTER BRYAN ASHLOCK
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
No. 3:02-CR-243-ALL-G

Before KING, *Chief Judge*, and BARKSDALE and PICKERING, *Circuit Judges.*

PER CURIAM: *

Defendant-Appellant Walter Bryan Ashlock appeals from the district court's judgment of conviction and sentence. For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2001, Ashlock was stopped for a traffic violation and was unable to present a driver's license. A computer check revealed that he had provided a false identity

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

to the police officer, and the officer conducted a pat-down search of Ashlock, revealing a knife, drug paraphernalia, and fourteen grams of a powdery substance later identified as methamphetamine. Ashlock was arrested. An inventory search of the car uncovered more drug paraphernalia and at least two driver's licenses that were not issued under Ashlock's name.

After Ashlock expressed interest in helping the police arrest methamphetamine manufacturers, the officers contacted a member of the Northeast Area Drug Interdiction Task Force (NADITF). Ashlock signed a confidential informant agreement with the task force official, listing his address as 406 Carl C. Senter Street, and he was released pending laboratory testing of the powdery substance. Ashlock only remained in contact with the task force (as required by the informant agreement) for three, days, and he never fulfilled his promise to assist task force officers in arresting local methamphetamine manufacturers. He was therefore considered terminated from the confidential informant program in January 2002. When the police laboratory subsequently reported that the powder Ashlock had been carrying contained methamphetamine, a warrant was issued for his arrest.

On January 10, 2002, Ashlock was stopped for a second traffic violation and a computer check revealed the outstanding arrest warrant. During the arrest, police officers discovered syringes and digital scales on his person as well as fifty-four grams of methamphetamine in plastic baggies, additional syringes, and various other items in the car he was driving.

From January until mid-April 2002, the police conducted periodic surveillance of the 406 Carl C. Senter address without observing Ashlock. On April 12, 2002, however, a repairman informed the police that Ashlock had threatened him while he was working at the Senter Street residence. The police secured a search warrant for Ashlock and discovered

him in the back yard, carrying twenty-four grams of methamphetamine. A subsequent search of the house, pursuant to a second warrant, uncovered multiple items associated with manufacturing methamphetamine. The police then sought assistance from Drug Enforcement Administration agents, who questioned Ashlock at the police station. Ashlock informed the agents that he was planning to manufacture methamphetamine later that night and was willing to cooperate with the DEA in bringing in his manufacturing associates. The agents declined his offer of cooperation.

On August 2, 2012, the police arrested a woman, Debra Jean Cronin, who informed the police that Ashlock was currently residing at 1112 Desdemona Street in Dallas and that she had purchased small quantities of methamphetamine from Ashlock on two or three occasions. In addition, she admitted selling Ashlock thousands of stolen pseudoephedrine cold pills, presumably for use in manufacturing methamphetamine, at least two or three times. Armed with this information, the police obtained a search warrant for the Desdemona residence. Upon their arrival at the house, an unidentified man drove away in a black pickup truck, which the police were unable to pursue after it ran through a stop light.

Later that night, Ashlock was arrested at a local hotel. He claimed that his name was Jerry Stone. He had two syringes, 0.8 grams of methamphetamine, and the keys to the previously identified black pickup truck in his possession. The police found the truck parked in the hotel garage. When officers searched Ashlock's Desdemona residence the next day, they discovered two firearms: a shotgun by the back door and a pistol under the mattress of the bed. The search also uncovered 111.9 grams of liquid methamphetamine, 0.87 grams of a powdery mixture containing methamphetamine, and other items associated with manufacturing and distributing methamphetamine. In addition, the officers found

equipment for producing false identifications and a driver's license bearing Ashlock's picture under the name "Jerry Dale Stone."

After a jury trial, Ashlock was convicted of (1) conspiring to manufacture with the intent to distribute in excess of 500 grams of methamphetamine between September 2001 and August 3, 2002, *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846; (2) possessing pseudoephedrine with the intent to manufacture and distribute methamphetamine on April 12, 2002, *see id.* § 841(c)(1); (3) possessing firearms as a convicted felon on August 3, 2002, *see* 18 U.S.C. §§ 922(g)(1), 924(a)(2); (4) possessing more than fifty grams of a mixture containing methamphetamine with the intent to distribute it on August 3, 2002, *see* 21 U.S.C. § 841(a)(l), (b)(1)(B); and (5) possessing more than fifty grams of a mixture containing methamphetamine with the intent to distribute it on January 10, 2002, *see id.* On appeal, Ashlock raises numerous challenges to the district court's evidentiary rulings, denial of his motion for judgments of acquittal, jury instructions, and application of the sentencing guidelines. We address each issue in turn.

II. DISCUSSION

A. *Evidentiary Rulings*

Ashlock first contends that the district court erred in admitting testimony from the government's three forensic experts regarding the chemical identity of the numerous substances seized from his person and residences. He claims that the testimony should have been excluded because the government's discovery disclosures were untimely and failed to comply with FED. R. CRIM. P. 16(a). Before trial, Ashlock moved either to strike the experts' testimony or for a 90-day continuance because, while the district court's pre-trial scheduling order instructed the government to fulfill its Rule 16(a) discovery obligations by October 4, Ashlock did not

receive the government's first expert witness disclosures until October 30. The district court granted the continuance and denied the motion to strike. Yet, Ashlock notes, the government's October 30 disclosure was incomplete—it revealed each expert's qualifications but only included a copy of one of the three experts' reports—and the government did not provide supplemental information until January 4, one week before trial. This supplemental disclosure contained the other two experts' reports, which listed their opinions on the substances they tested and included copies of their actual test results, well as hundreds of pages of test results from the first expert witness. Based on this sequence of events, Ashlock claims on appeal that the district court erred in denying his subsequent motion to strike the experts' testimony both because the as supplemental disclosure did not provide detailed protocols of the tests employed by the forensic experts and because, even if the disclosures were sufficiently detailed, he was prejudiced by receiving the required information less than a week before trial.

We review a district court's evidentiary rulings, including its "remedies for alleged discovery violations," for an abuse of discretion. *United States v. Smith*, 354 F.3d 390, 397 (5th Cir. 2003). In addition, "our cases consistently have required a showing of prejudice to the substantial rights of the defendant before reversing because of an error in administering the discovery rules." *United States v. Garcia*, 917 F.2d 1370, 1374 (5th Cir. 1990) (citation and quotation marks omitted). Under Rule 16(a) (1) (F)-(G), the government "must permit a defendant to inspect and to copy or photograph the results or reports of . . . any scientific test or experiment" that the government "intends to use . . . in its case-in-chief at trial" and it must provide a summary of each expert's testimony, which "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Rule 16(a) does not instruct the government to provide detailed step-by-step information regarding the routine pro-

tocols employed by the expert in performing the tests discussed in the report, however. Therefore, we hold that the district court did not abuse its discretion in concluding that the government's disclosures satisfied Rule 16(a). *United States v. Price*, 75 F.3d 1440, 1444-45 (10th Cir. 1996) (discussing Rule 16(a)(1)(D), which became Rule 16(a)(1)(F) under the 2000 amendments to the Criminal Rules); *United States v. Iglesias*, 881 F.2d 1519, 1522-23 (9th Cir. 1989); cf. *United States v. Berry*, 670 F.2d 583, 605-06 (5th Cir. Unit B 1982) (refusing to require disclosure of the government's "Analytic Manual" for testing chemical substances).

Moreover, even if we were to conclude that the district court abused its discretion in allowing the government to delay fulfilling its obligations under Rule 16(a) until a week before trial, Ashlock has not demonstrated that he was prejudiced by the *timing* of the disclosures. *See, e.g., United States v. Mendoza*, 244 F.3d 1037, 1047 (9th Cir. 2001) ("The prejudice that must be shown to justify reversal" in these circumstances "is a likelihood that the verdict would have been different had the government complied with the discovery rules, *not had the evidence [been] suppressed.*" (emphasis added) (citation and quotation marks omitted)). Importantly, Ashlock's claim that his receipt of this material within a week of trial was debilitating to his defense is belied both by his failure to request a continuance, *see, e.g., United States v. Ivy*, 83 F.3d 1266, 1281 (10th Cir. 1996), and by his attorney's ability to conduct a detailed cross-examination of each of the government's experts at trial, *see United States v. Koopmans*, 757 F.2d 901, 906 (7th Cir. 1985). Additionally, although the district court had granted Ashlock's pre-trial request for funds to hire a witness with expertise in chemical analysis, Ashlock did not call an expert witness at trial to cast doubt either on the government experts' testing procedures or on their identification of the seized substances. *See Price*, 75 F.3d at 1446 (finding it "implausible that [the defendant] suffered prejudice" from a Rule 16 (a) violation since "[h]e was free to

develop his own expert testimony" but chose not to do so). Thus, we decline to reverse Ashlock's conviction on this basis.

In the alternative, Ashlock argues that the government's expert-witness testimony was unreliable and should have been excluded under FED. R. EVID. 702. Rule 702 "imposes a special obligation on a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). We have explained that the district court enjoys wide latitude in assessing the reliability of an expert's testimony and consider a number of factors, including "whether a theory or technique can be or has been tested, has been subjected to peer review, has received general acceptance, and the technique's known or potential error rate." *United States v. Norris*, 217 F.3d 262, 269 (5th Cir. 2000).

Ashlock's main critique of the government's forensic testimony centers on the experts' failure to disclose the protocols they followed in testing the substances they identified as contraband, rendering it impossible for anyone other than a chemist to examine the test results independently and reach a conclusion regarding the identity of the substances tested. Nothing in Rule 702 requires an expert to provide this level of detail, however. Instead, Rule 702 simply dictates that the party presenting the expert testimony must show by a preponderance of the evidence that the testimony is reliable. *See United States v. Fullwood*, 342 F.3d 409, 412 (5th Cir. 2003). At trial, the government met this burden by eliciting testimony revealing that: (1) each expert held a bachelor's degree in chemistry and had extensive on-the-job training in forensic chemistry; (2) each of the tests performed by the experts was generally accepted in the field of forensic chemistry; (3) each of the tests was performed in accordance with the standard procedures used in the laboratory; and (4) each

expert had his or her results reviewed by another chemist in the laboratory or by a laboratory administrator. Based on this evidence, we hold that the district court did not abuse its discretion in admitting the government's expert-witness testimony under Rule 702.[2]

In his second claim of error, Ashlock argues that the district court should have stricken the testimony of Tommy Browning, a lay witness, regarding methods of manufacturing methamphetamine. Ashlock does not deny that Browning had

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[2] Ashlock's arguments regarding individual aspects of the experts' testimony also lack merit. He claims, for example, that some of the experiments performed on the seized substances were merely preliminary in nature and therefore inherently unreliable. Yet, as the forensic experts explained at trial, the generally accepted practice announced by the American Society of Crime Laboratories involves a series of two tests to identify narcotics: a preliminary and a confirmatory test. Because the experts testified that confirmatory tests were used to verify the results of each preliminary test, we agree with the district court that these experiments met the standard of Rule 702.

Moreover, we reject Ashlock's contention that one expert's testimony regarding the *theoretical* yield of methamphetamine that could have been produced from the pseudoephedrine tablets seized at one of his residences should have been stricken because the calculation did not reveal the actual amount of methamphetamine Ashlock himself would have produced. This evidence was only relevant to the drug quantity alleged in count 1 of the indictment: conspiracy to manufacture more than 500 grams of methamphetamine. Yet the record contained ample evidence, aside from the theoretical-yield testimony, from which the jury could infer that Ashlock was involved in a conspiracy to manufacture more than 500 grams of methamphetamine. For example, one witness testified that he had seen Ashlock "cook" methamphetamine, had sold Ashlock thousands of pseudoephedrine pills, and had purchased more than ten pounds of methamphetamine from Ashlock during the time period alleged in the indictment. Therefore, regardless of whether the expert's theoretical-yield testimony met the standard in Rule 702, we need not reverse Ashlock's conviction because the error (if any) was harmless. *See Norris*, 217 F.3d at 278 (applying harmless error); *cf. United States v. Cavely*, 318 F.3d 987, 998 n.3 (10th Cir. 2003).

personal knowledge of these matters but instead claims that Browning's testimony involved specialized knowledge outside the province of the jury and, thus, the government should have been required to designate Browning as an expert witness and to fulfill the disclosure requirements in FED. R. CRIM. P. 16(a). In support, he observes that the Advisory Committee to the 2000 Amendments to Federal Rules of Evidence expressly observed that a lay witness might properly testify "that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established," but "[i]f . . . that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702." FED. R. EVID. 701 advisory committee's note (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997)).

This court reviews a district court's decision whether a witness must be designated as an expert for an abuse of discretion. *United States v. Griffin*, 324 F.3d 330, 347 (5th Cir. 2003). Under the Advisory Committee's interpretation of Rule 701, the court should not have admitted Browning's testimony regarding methods of methamphetamine manufacturing without first qualifying him as an expert witness. We need not decide whether to adopt the Advisory Committee's position, however, because we conclude the district court's error, if any, was harmless. *See United States v. Griffith*, 118 F.3d 318, 323 (5th Cir. 1997). The potentially objectionable portions of Browning's testimony—e.g., his discussion of the relative benefits of the red phosphorus manufacturing method—were cumulative of testimony proffered by the government's properly designated expert witness, DEA Agent Rick Smith. *See Griffin*, 324 F.3d at 348 ("Where objected to testimony is cumulative of other testimony that has not been objected to, the error that occurred is harmless.").

Ashlock attempts to circumvent a finding of harmless error by arguing that only Browning, and not Agent Smith, offered evidence personally linking Ashlock to methamphetamine manufacturing. But, Browning's testimony that he had sold Ashlock thousands of pseudoephedrine pills and that he witnessed Ashlock "cooking" methamphetamine was well within the bounds of permissible *lay witness* testimony, even under the Advisory Committee's interpretation of Rule 701. *See* FED. R. EVID. 701 advisory committee's note ("[Only the parts] of a witness' testimony that [are] based upon scientific, technical, or other specialized knowledge . . . [are] governed by the standards of Rule 702 and the corresponding disclosure requirements [of FED. R. CRIM. P. 161.").

Ashlock's remaining arguments about the district court's evidentiary rulings involve the admission, over Ashlock's objections, of several items of (what he categorizes as) hearsay or irrelevant evidence. For example, he claims that the district court should have excluded (1) two maps used by law enforcement witnesses to describe the events surrounding Ashlock's commission of two traffic violations and (2) various false identification papers and other documents seized from the Desdemona residence and from a nearby car. Ashlock argues, in a conclusory fashion, that he was prejudiced by the admission of these items. But, he makes no attempt to demonstrate how, 'in light of all of the evidence," the objected-to items "actually contributed to the jury's verdict." *United States v. Cantu*, 167 F.3d 198, 206 (5th Cir. 1999). We are unable to comprehend how these maps and assorted documents could have tainted the jury's verdict on the charges at issue in the case, especially considering the voluminous evidence adduced at trial regarding Ashlock's drug possession and methamphetamine-manufacturing activities. Accordingly, the district court's error in admitting these items, if any, was harmless.

B. *Judgment of Acquittal*

Ashlock also argues that there was insufficient evidence to sustain the charges in counts 1 and 3 of the indictment and that the district court erred in not granting his motion for judgments of acquittal. We review the district court's denial of a judgment of acquittal *de novo*. *United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 1998). "In doing so, we consider the evidence, all reasonable inferences drawn from it and all credibility determinations in the light most favorable to the Government, and affirm if a reasonable jury could find the offense's essential elements beyond a reasonable doubt." *Id.*

To establish Ashlock's guilt on count 1—conspiracy to manufacture more than 500 grams of methamphetamine—the government was required to prove beyond.a reasonable doubt that an agreement existed between two or more persons to manufacture methamphetamine and that Ashlock both knew of and voluntarily participated in the conspiracy. *See id.*; *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995). Ashlock does not argue that there was insufficient evidence for a jury to find that a conspiracy to manufacture methamphetamine existed or that he knew about this conspiracy. Rather, he claims that the government failed to prove that he voluntarily participated in the conspiracy. We disagree. At trial, the government adduced evidence: that Ashlock resided at the Carl C. Senter and Desdemona residences; that drug manufacturing paraphernalia was seized from each residence; that Ashlock informed DEA Agents in April 2002 that he planned to manufacture methamphetamine; and that at least one eyewitness had personally seen Ashlock manufacture methamphetamine on more than one occasion. Viewed in the light most favorable to the government, this evidence was sufficient to prove beyond a reasonable doubt that Ashlock voluntarily participated in a conspiracy to manufacture methamphetamine.

Nevertheless, Ashlock argues that the government's evidence does not specifically demonstrate that he participated in the drug conspiracy between September 2001 and August 3, 2002—the time period alleged in the indictment. However, the evidence we have outlined above places Ashlock's participation in the manufacturing conspiracy within the relevant time frame. Moreover, to the extent that the government's evidence might be construed to include events occurring more than a year before the earliest date charged in the indictment, as Ashlock claims, this flaw is not fatal to the government's case. As we explained in *United States v. Lokey*, 945 F.2d 825 (5th Cir. 1991):

> [A]n allegation as to the time of the offense is not an essential element of the offense charged in the indictment and, within reasonable limits, proof of any date before the return of the indictment and within the statute of limitations is sufficient. . . . When conspiracy is charged, an indictment satisfies the requirements of the statute of limitations if the government alleges and proves, at trial or pretrial, that the conspiracy continued into the limitations period.

Id. at 832 (alteration in original) (citation and internal quotation marks omitted). Therefore, because there was evidence that the conspiracy continued through the time stated in the indictment, the district court did not err in denying his motion for acquittal on count 1.

To convict Ashlock on count 3—being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1)—the government was required to prove beyond a reasonable doubt that (1) Ashlock was a convicted felon, (2) who possessed a firearm, and (3) the firearm was in or affected interstate commerce. *See United States v. Fields*, 72 F.3d 1200, 1211 (5th Cir. 1996). Ashlock admits that he was a convicted felon but avers that the government adduced insufficient evidence to prove the second and third elements of this crime. After

reviewing the record, we find both arguments legally untenable.

To satisfy the second element, the government presented two witnesses who testified that Ashlock lived in the Desdemona residence where the firearms were discovered. One witness also testified that he had seen Ashlock with a shotgun and a pistol in his home. This evidence was sufficient to demonstrate, at a minimum, Ashlock's constructive possession of the firearms. *See United States v. Smith*, 930 F.2d 1081, 1085 (5th Cir. 1991) (requiring proof of "ownership, dominion, or control over the [firearm] itself, dominion or control over the premises in which the [firearm] [was] concealed" (internal quotation marks omitted)). Moreover, although Ashlock implies that he was not the sole inhabitant of the house where the guns were seized, the government's evidence that the shotgun was found in plain view by the back door of the house is legally sufficient to sustain the charge under § 922 (9) (1). *See Fields*, 72 F.3d at 1212 (holding, in a case where the defendant jointly occupied a home, that "the fact that the shotgun was found in plain view, leaning against a wall, is sufficient to establish" constructive possession).

Similarly, the government produced sufficient evidence from which a reasonable jury could conclude, beyond a reasonable doubt, that the firearms possessed by Ashlock affected interstate commerce. Under this circuit's precedents, the government may establish the interstate commerce element of § 922(g)(1) through testimony "that the firearms were manufactured outside of Texas and traveled in interstate commerce to reach Texas." *Fields*, 72 F.3d at 1211. At trial, a government expert testified that the Ithaca shotgun could only have been manufactured in New York and the Jennings pistol could only have been manufactured in California; thus, both firearms must necessarily have crossed state lines to arrive at the Desdemona Street residence in Texas. Accordingly, the

district court did not err in denying Ashlock's motion for judgment of acquittal on count 3.

C. *Public Authority Jury Instruction*

Ashlock argues that the district court erred in denying his request for a public authority jury instruction. We review the district court's refusal to provide a jury instruction for an abuse of discretion. *See United States v. Trevifio-Martinez*, 86 F.3d 65, 67 (5th Cir. 1996). "A conviction cannot be overturned for failure to instruct the jury on a defense unless the requested but omitted instruction has an evidentiary basis in the record which would lead to acquittal." *United States v. Srsires*, 79 F.3d 464, 466 (5th Cir. 1996).

The "'public authority' defense . . . requires a defendant to show that he was engaged by a government official to participate in covert activity." *United States v. Fox*, 248 F.3d 394, 408 (5th Cir. 2001) (citing *Spires*, 79 F.3d at 466 n.2), *vacated on other grounds*, 535 U.S. 1014 (2002). Ashlock believes that he satisfied this burden and points to his agreement with the local drug task force, which he signed on December 2001, as evidence of his authority to carry firearms, illegally possess pseudoephedrine, and manufacture methamphetamine. But the confidential agreement, which was introduced by the government at trial, included the following statements (all of which were initialed by Ashlock):

> I . . . understand that I am not to carry a firearm or weapon of any type while working with the NADITF.
>
> * * *
>
> I further understand that I may not engage in any illegal or improper conduct so long as I am working with the NADITF.
>
> * * *
>
> Further, I understand that any violations arising from my action in violation of the aforementioned circumstances

> will result in an investigation of the matter. If the charges are substantiated, appropriate action, to include the possibility of criminal prosecution, will be taken.

As these provisions make clear, Ashlock could not have reasonably believed, based on this agreement, that he was authorized to engage in the criminal activities for which he was charged. *Cf. Spires*, 79 F.3d at 466 n.2 (explaining, in dicta, that a defendant who was charged with illegally possessing a firearm "prudently d[id] not raise a . . . defense of acting under public authority" since his confidential informant agreement contained the condition that he "not carry a firearm"). Because Ashlock does not identify any other evidence that might support an inference that he was authorized to engage in criminal activities as a task-force confidential informant, we conclude that the district court did not abuse its discretion in denying Ashlock's request for a public authority jury instruction.

D. *Application of the Sentencing Guidelines*

Finally, Ashlock contends that the district court violated his Fifth Amendment right to due process and his Sixth Amendment right to a trial by jury when it enhanced his sentence under the Federal Guidelines based on factors found by the judge based on a preponderance of the evidence, not by the jury under a reasonable doubt standard. In particular, he argues that the judge should not have enhanced his sentence (1) by two levels for recklessly fleeing from the police on August 3, 2002, in a black pickup truck, *see* U.S.S.G. § 3C1.2; (2) by three levels for creating a substantial risk of harm to human life and the environment through his methamphetamine manufacturing, *see id.* § 2D1.1(b)(5)(B); and (3) by two levels for obstructing justice by asking a witness not to cooperate fully with the government, *see id.* § 3C1.1.

The government contends that we must apply a plain error standard of review because Ashlock did not object, on these grounds, during the sentencing proceedings. We disagree. Before trial, Ashlock filed an "Advance Notice of Difficult Questions" in which he argued that the government should not be permitted to seek enhancement of his sentence based on any fact not "properly pleaded in the superseded [sic] indictment." He argued, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact used to increase his sentence had to be submitted to a jury and proved beyond a reasonable doubt. Because the district court rejected this argument without indicating a willingness to reconsider the issue at sentencing, we conclude that Ashlock has properly preserved this issue for appeal. *See United States v. Hopkins*, 433 F.2d 1041, 1044 (5th Cir. 1970); *cf. Bender v. Brumley*, 1 F.3d 271, 277 (5th Cir. 1993) ("We recognize that error is preserved for appeal so long as the complaining party states his assertion to the trial court prior to the time when the court invites on-the-record objections to the charge.").

Nevertheless, even under a harmless-error standard, we hold that Ashlock's argument is foreclosed by this court's precedents. As we recently explained in *United States v. Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004), "[j]udicial findings under the Guidelines that set sentences within [the range authorized by the United States Code] . . . do not offend the Constitution." *Id.* at *9. Therefore, because Ashlock's sentence under each count of the indictment did not exceed the maximum penalty authorized by the United States Code, the district court's application of the Federal Guidelines to enhance Ashlock's sentence was not constitutionally infirm.

III. CONCLUSION

Accordingly, we AFFIRM district court's judgment and sentence.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-30437

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCISCO D. PINEIRO, also known as Frank Pineiro,
Defendant- Appellant.

July 12, 2004

Before KING, *Chief Judge*, and BARKSDALE and PICKERING, *Circuit Judges*.

KING, *Chief Judge*:

In this case we are called upon to consider the impact on the federal Sentencing Guidelines of the Supreme Court's recent opinion in *Blakely v. Washington*, U.S.—, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Defendant Francisco D. Pineiro was convicted in the district court of violating the federal controlled-substances laws. During sentencing, the district judge followed then-uncontroversial pre-*Blakely* procedures and made various factual findings that determined Pineiro's sentencing range under the Guidelines.

This court assuredly will not be the final arbiter of whether *Blakely* applies to the federal Guidelines, but the unremitting press of sentencing appeals requires us to produce a decision. We have undertaken to discern, consistent with our role as an intermediate appellate court, what remains the governing

law in the wake of *Blakely*. Having considered the *Blakely* decision, prior Supreme Court cases, and our own circuit precedent, we hold that *Blakely* does not extend to the federal Guidelines and that Pineiro's sentence did not violate the Constitution. Accordingly, the defendant's sentence is affirmed.

I. BACKGROUND

A three-count indictment charged Pineiro with committing federal drug offenses. Count one charged Pineiro with carrying on a marijuana—and cocaine-distribution conspiracy, involving at least 100 kilograms of marijuana and 50 grams of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846.[1] Count two charged him with possessing and aiding and abetting possession with intent to distribute approximately three-fourths of a pound of marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.[2] Count three charged him with possessing and aiding and abetting possession with intent to distribute approximately twenty-one pounds of marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Pineiro pleaded not guilty, and his case proceeded to trial. On the first count of the indictment, the verdict form required the jury to indicate the amounts (if any) of marijuana and cocaine that the jury found that Pineiro had conspired to distribute. As to marijuana, the jury could choose whether Pineiro was guilty of conspiring to distribute "100 kilograms or more," "50 to 100 kilograms," "less than 50 kilograms," or whether he was not guilty. Similarly, for cocaine, the jury

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[1] Section 841(a)(1) provides that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 846 makes it a crime to "attempt[] or conspire[] to commit any offense defined in this subchapter."

[2] Section 2 is the United States Code's general prohibition on aiding and abetting violations of the federal criminal statutes.

could choose from "50 grams or more," "50 grams or less," or not guilty.[3] The jury found Pineiro guilty of conspiring to distribute the lowest amounts listed: "less than 50 kilograms" of marijuana and "50 grams or less" of cocaine. The jury also found Pineiro guilty as charged on counts two and three.

Based on the drug quantities found by the jury, the maximum sentences set forth in the United States Code were 20 years for count one, *see* 21 U.S.C. § 841(b)(1)(C) (establishing maximum sentences for any amount of cocaine less than 500 grams), and 5 years for counts two and three, *see id.* § 841(b)(1)(D) (establishing Maximum sentences for less than 50 kilograms of marijuana).

In accordance with the usual practice, a probation officer prepared a Presentence Investigation Report (PSR) to assist the judge in determining an appropriate sentence within the statutory range. The PSR used the 2002 version of the United States Sentencing Commission's Guidelines Manual. The PSR held Pineiro responsible for amounts of drugs much greater than the amounts found by the jury: based on statements from several unnamed cooperating witnesses, the PSR indicated that Pineiro was responsible for 453.6 kilograms of marijuana and 1,048.95 grams of cocaine in connection with the conspiracy charge. Based on this quantity of illegal drugs, the PSR concluded that the base offense level for the first count was 28. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table). The PSR further recommended that Pineiro also receive a four-level sentence enhancement under U.S.S.G. § 3B1.1(a) for being "an organizer or leader" of the conspiracy. The resulting total offense level of 32, when combined with Pineiro's criminal history category of I (he

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[3] Some of the amounts on the verdict form do not line up with the gradations in 21 U.S.C. § 841(b). At oral argument we inquired as to why the form was confected in this way, but neither side could provide an explanation.

had no prior convictions), yielded a Guidelines sentencing range of 121 to 151 months.

Pineiro objected to the PSR on several grounds, two of which are relevant to this appeal. First, he objected to the base offense level of 28, complaining that the jury's findings with respect to drug quantities required a lower base offense level. His objection argued that using the larger quantities would conflict with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and would disrespect "the sanctity of the jury proceedings." Second, he objected to the four-level "organizer or leader" enhancement on the ground that the evidence at trial did not support such a factual finding, but he did not raise the constitutional claim regarding this enhancement.

The district court overruled Pineiro's objections and sentenced him to 121 months on the first count, 60 months on the second count, and 60 months on the third count, with the sentences to run concurrently.

Piniero then appealed his sentence. In his initial brief, he conceded that his *Apprendi*-based challenge to the district court's drug-quantity calculation was fore-closed by circuit precedent, but he nonetheless raised the issue to preserve it for further review. After briefing was completed but before oral argument, the Supreme Court decided *Blakely*, and we ordered supplemental briefing to assess its impact. Pineiro contends that *Blakely* applies to the federal Guidelines and that his sentence must be vacated and the case remanded for resentencing.[4] The government contends that *Blakely* does not apply.

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[4] Pineiro argues, and we agree, that his *Apprendi*-based objection to the PSR's drug-quantity calculations was sufficient to preserve for *de novo* appellate review the constitutional challenge to his sentence. *See United States v. Doggett*, 230 F.3d 160, 162-63, 165 (5th Cir. 2000) (holding that an objection to a PSR based on *Jones v. United States*, 526 U.S. 227, 119

II. ANALYSIS

A. Impact of Blakely

Had today's case been decided a month ago, Pineiro's *Apprendi* challenge would not have been a difficult one to resolve. Although post-verdict judicial findings of fact increased Pineiro's sentence substantially, the resulting sentence does not exceed the statutory maximum set forth in the United States Code. We therefore would simply have applied long entrenched circuit precedent that holds *Apprendi* inapplicable to such circumstances. *See, e.g., United States v. Floyd*, 343 F.3d 363, 372 (5th Cir.2003), *cert. denied*;—U.S.—124 S.Ct. 2190, 158. L.Ed.2d 752 (2004); *United States v. McIntosh*, 280 F.3d 479, 484 (5th Cir.2002); *United States v. Keith*, 230 F.3d 784, 787 (5th Cir.2000), *cert denied*, 531 U.S. 1182, 121 S.Ct. 1163, 148 L.Ed2d 1023 (2001); *Doggett*, 230 F.3d at 165-66. This line of authority embraces the view that judge-made factual findings that determine Guidelines ranges below the congressionally enacted maximum sentence are constitutionally equivalent to the sentencing. judge's historic discretion to choose a sentence within a legislatively authorized range. But because of the Supreme Court's recent decision in *Blakely,* we are now required to consider the viability of that line of cases, and indeed the continued force of certain prior Supreme Court decisions as well. Committed as we are to principles of stare decisis and orderliness, we do not depart from settled law in the absence of an on-point en bane or Supreme Court holding. *See, e.g., Robinson v. Parsons*, 560 F.2d 720, 721 n. 2 (5th Cir.1977).

S.Ct. 1215, 143 L.Ed.2d 311 (1999), preserved an *Apprendi* challenge to the defendant's sentence). As to the sentence enhancement for being a leader or organizer, Pineiro does not claim that his fact-based objection to the PSR was sufficient to preserve the constitutional issue; he claims, however, that the district court committed reversible plain error in light of *Blakely*.

Blakely involved the sentencing regime of the State of Washington. The Washington criminal code establishes maximum sentences for felonies according to whether the crime is a class A, B, or C felony. Also codified as part of the state statutes, however, is the Sentencing Reform Act, which establishes presumptive sentencing ranges based on the "seriousness level" of the offense and the offender's criminal history. The seriousness level of the offense is for the most part a function of the statute of conviction. The Act permits the judge to impose a sentence above the presumptive range when there exist "substantial and compelling reasons justifying an exceptional sentence." The Act sets out a list of such factors, but the list is only illustrative, not exhaustive. A factor is a permissible reason for imposing an exceptional sentence only if it is not already taken into account in the calculation of the presumptive range.

Blakely pleaded guilty to second-degree kidnapping with a firearm. As a class B felony, it was punishable under the state criminal code by a sentence of up to 10 years. 'The Sentencing Reform Act, though, specified a presumptive range of only, 49 to 53 months for this particular crime. At sentencing, the judge unposed an exceptional sentence of 90 months on the ground that *Blakely* had acted with "deliberate cruelty," a statutorily enumerated ground for upward departure. The defendant objected to the increase, but the trial judge adhered to his decision after conducting a three-day bench hearing.

In reaching its decision that *Blakely*'s sentence was imposed in violation of the Constitution, the Supreme Court took as its primary precedent its decision in *Apprendi v. New Jersey. Apprendi* involved two New Jersey statutes, one that authorized a 10–year term for the second-degree offense of unlawful possession of a firearm and a second statute that provided for a term of 10 to 20 years if the trial judge found that the defendant acted with the intent to intimidate the victim based on his race or other protected statuses. 530 U.S.

at 468-69, 120 S.Ct. 2348. The *Apprendi* Court concluded that the factual findings supporting the enhanced sentence had to be made by the jury, not the judge. "Other than the fact of a prior conviction," the Court held, "any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348 (emphasis added). Two years later, *in Ring v. Arizona*, 536 U.S. 584, 597, 604-09, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court applied *Apprendi* to an Arizona capital-sentencing statute that permitted imposition of the death penalty when a judge found one of ten aggravating factors. As the Court described them in *Blakely*, the *Apprendi* and *Ring* decisions both held "that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely*, 124 S.Ct. at 2536-37.

The aspect of *Blakely* that threatens the federal Guidelines is the Court's reasoning regarding the relevant "statutory maxi-mum" for *Apprendi* purposes. The State argued that the relevant maximum was the 10-year maximum that the criminal code specified for class B felonies. Since the judge's exceptional 90-month sentence was still within the 10-year maximum, the State contended that there was no *Apprendi* violation. The Court pointedly rejected that argument, instead concluding that the relevant maximum was 53 months, the top of the presumptive sentencing range under Washington's Sentencing Reform Act:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge

> inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. 124 S.Ct at 2537 (citations omitted). The Court then pointed out that the trial judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea. *Id.* at 2537-38. To support that sentence, the judge had to find the aggravating factor. The Court explained:

> The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

Id. at 2538.

The Court acknowledged, and did not overrule, prior cases upholding sentencing schemes that impose a mandatory. *minimum* sentence based on judge-made factual findings. *See Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002); *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). The Court also reaffirmed the constitutionality of indeterminate-sentencing regimes in which a sentencing judge may, but need not, rely on factual determinations outside of the verdict in fixing a sentence within a broad statutory range. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). But the Court distinguished mandatory-minimum and indeterminate-sentencing systems from the Washington system on the ground that they did not involve sentences "greater than what state law authorized on the basis of the verdict alone." *Blakely*, 124 S.Ct at 2538.

Justice Scalia's opinion for the *Blakely* majority noted that the federal Guidelines were not before the Court, and the Court expressly declined to express any opinion as to them. *Id.* at 2538 n. 9. That disclaimer does not by itself mean that

Blakely carries no import for the federal Guidelines, for the binding force of a Supreme Court decision is ordinarily not limited to the particular set of facts that produces it. Indeed, the dissenting Justices certainly thought that the Court's reasoning might foretell the end of the federal Guidelines. *See id.* at 2549-50 (O'Connor, J., dissenting); *id.* at 2560-62 (Breyer, J., dissenting). That prophecy has already been realized .in several courts across the country, *see, e.g., United States v. Booker*, 375 F.3d 508, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004); *United States v. Croxford*, 324 F.Supp.3d 1230, No. 2:02-CR-00302PGC, 2004 WL 1521560 (D.Utah July 7, 2004), though those courts have reached no consensus" on how sentencing is to proceed after the 'overthrow of the old regime.

In the wake of *Blakely*, the constitutional fate of the federal Guidelines depends on whether the Guidelines effectively operate as statutes that define different offenses with different maximum sentences; expressed in different terms, the question is whether a Guidelines sentencing range unenhanced by judicial findings sets a "maximum sentence" for purposes of *Apprendi*. If that is how the Guidelines operate, then Pineiro's sentence is unconstitutional because the verdict did not authorize the sentence; instead, the judge's findings effectively determined the offense of which Pineiro was convicted. The competing vision of how the Guidelines operate—the position that the government urges pictures the Guidelines as a tool for channeling the sentencing court's historic discretion to choose a sentence within the broad range established by the crime's statutory (i.e., United States Code) minimum and maximum. On this second view, a sentencing judge's factual findings under the Guidelines do not raise the "maximum sentence" to which the defendant is exposed, the infirmity that the Court identified in *Apprendi* and *Ring*; the only constitutionally relevant "maximum sentence," according to this second view, is the 20-year sentence authorized in § 841 of Title 21 of the United States Code. The constitutional

implication of this second view is that judge-made factual findings that determine Guidelines ranges within the statutory maximum are no more problematic than the sentencing judge's historic discretion to choose a sentence within a legislatively authorized range. As explained more fully below, both the Supreme. Court and this court have for sometime embraced the second vision of how the Guidelines operate.

Undeniably, *Blakely* strikes hard at the prevailing understanding of the Guidelines. The Guidelines, unlike Washington's Sentencing Reform Act, are not statutes, but they are nonetheless binding on sentencing courts. *See Stinson v. United States*, 508 U.S. 36, 42, 44-45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993). Federal statutes direct the district judge to follow the Guidelines. *See* 18 U.S.C. § 3553(b) (stating that the sentencing court "shall impose a sentence of the kind, and within the range," established by an applicable Guideline). Like the judge who disregards the Washington sentencing rules, a federal judge who disregards the Guidelines does so on pain of reversal. The Guidelines Manual is not a catalog of mere suggestions.

But *Blakely*, which did not actually involve the federal Guidelines, is not the only case that we must consider. While we are bound to follow *Blakely*, as an inferior court we are also bound to examine the Supreme Court's prior pronouncements and guidance regarding the nature of the Guidelines. That examination reveals that a number of the Court's prior cases, including cases that reject various constitutional challenges to the Guidelines, are founded on the proposition that there are constitutionally meaningful differences between Guidelines ranges and United States Code maxima. These cases paint a picture of how the Guidelines operate that dashes with the one that Pineiro would have us adopt.

In canvassing those prior rulings, we look first to *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d

714 (1989). Decided shortly after "the promulgation of the Guidelines, *Mistretta* upheld them against constitutional arguments that Congress had delegated excessive authority to the Sentencing Commission and that the Commission was constituted in violation of the separation of powers. *Id.* at 370-71, 380, 109 S.Ct. 647. The opinion did not discuss the due process or Sixth Amendment considerations involved in *Apprendi* and *Blakely*, but the case is not without meaning for us. In the course of the Court's rejection of the argument that the placement of the Sentencing Commission in the judicial branch violated the separation of powers by placing legislative policymaking authority in the judiciary, *see id.* at 383, 385, 109 S.Ct. 647, the Court described the Guidelines as follows:

> [The Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. *They do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress.*

Id. at 396, 109 S.Ct. 647 (emphasis added). Thus, part of the reason that the Court was able to reject the separation-of-powers challenge was its conclusion that the Guidelines do not set maximum sentences in the same way as do congressional enactments.

Later Supreme Court cases have consistently embraced and relied on the distinction between Guidelines ranges and maximum sentences in rejecting various challenges to the Guidelines. One example of this practice is *Edwards v. United States*, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed2d 703 (1998). The defendants in *Edwards* were charged with conspiring to distribute cocaine powder and crack. The jury convicted them, but the instructions stated that the government only had to prove, a conspiracy involving powder *or*

crack. In determining the sentence, the judge held the defendants responsible for amounts of both forms of the drug. The defendants challenged their sentences on the ground that the sentencing judge was required by the Guidelines, the statutes, *and the Constitution* to consider only powder, which is punished less harshly than crack. The unanimous Supreme Court disagreed. The Court's opinion was mainly concerned with how the Guidelines' "relevant conduct" rules operate: Since the Guidelines instruct the judge to examine relevant conduct as well as conduct underlying the conviction, the crack could be considered even if the verdict were limited to powder. *Id.* at 513-14, 118 S.Ct. 1475. But the Court also turned away a potential constitutional argument, observing that the defendants' contentions might have been more persuasive *had the defendants' sentences exceeded the statutory maxima set forth in the United States Code. Id.* at 515, 118 S.Ct. 1475. This remark is only suggestive in itself—Court did not really explain what he potential constitutional argument would be[5] but it gathers meaning by virtue of the fact that the Court cited this passage from Edwards at the close of *Apprendi:*

> The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g., Edwards v. United States*, 523 U.S. 511, 515, 118 S.Ct. 1475, 140 LEd.2d 703 (1998) (opinion of BREYER, J., for a unanimous court) (noting that "[of] course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [United States Sentencing Commission, Guidelines Manual § 5G1.1 (Nov.1994)]").

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[5] The defendants' briefs show that they raised Sixth Amendment and due process considerations.

Apprendi, 530 U.S. at 497 n. 21, 120 S.Ct. 2348. Our precedents have accordingly read *Apprendi* as intending to leave undisturbed the rule, described in *Edwards*, that the sentencing judge may properly find facts that move the Guidelines range within the statutory maximum. *See United States v. McWaine*, 290 F.3d 269, 274 (5th Cir.), *cert. denied*, 537 U.S. 921, 123 S.Ct. 311, 154 L.Ed.2d 210 (2002); *Dogget*, 230 F.3d at 166; *see also United States v. Kinter*, 235 F.3d 192, 201-02 (4th Cir.2000) (similarly harmonizing *Apprendi* and *Edwards*). Indeed, the Supreme Court's own post-*Apprendi* cases have continued to treat the United States Code maximum as the relevant consideration for purposes of *Apprendi*. *See United States v. Cotton*, 535 U.S. 625, 633 n. 3, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) (noting that the defendants challenged the PSR's determination that the crime involved 1.5 kilograms of cocaine, which yielded a Guidelines offense level of 38, but "they never argued that the conspiracy involved less than 50 grams of cocaine base, *which is the relevant quantity for purposes of Apprendi, as that is the threshold quantity for the penalty of life imprisonment in* 21 U.S.C. § 841(b) (1) (A)" (emphasis added)).

Also instructive is *Witte v. United States*, 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995). There, the drug-quantity calculations that supported the defendant's sentence for a conviction arising from a 1991 drug transaction. included quantities from an uncharged 1990 drug transaction as relevant conduct. When the defendant was later indicted for the 1990 transaction, he moved to dismiss the indictment on double-jeopardy grounds. The Court recognized that the inclusion of the 1990 conduct increased the defendant's offense level and corresponding Guidelines range, but it pointed out that the sentence "still falls within the scope of the *legislatively authorized penalty* (5 to 40 years)." *Id.* at 399, 115 S.Ct. 2199 (emphasis added). The Court then concluded that the defendant's first sentence did not count as "punishment" for the separate offense of committing the 1990

transaction. *Id.* at 399-400, 115 S.Ct. 2199. The Court observed that courts had traditionally been permitted to use uncharged conduct to in-form their sentencing discretion, and the Court specifically stated that the advent of the Guidelines, with their "relevant conduct" rules, did not mean that offenders were now being "punished" for uncharged conduct as a separate offense. *Id.* at 397-402, 115 S.Ct. 2199. The Court concluded:

> Because consideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct, the instant prosecution does not violate the Double Jeopardy Clause's prohibition against the imposition of multiple punishments for the same offense.

Id. at 406, 115 S.Ct. 2199.

These cases, and others like them,[6] do not discuss the Sixth Amendment right to a jury trial, and we do not pretend otherwise. What is true, however, is that the Supreme Court has repeatedly blessed the Guidelines and upheld them against sun-dry constitutional challenges, often employing the proposition that the United States Code, and not the Guidelines, establishes maximum sentences for offenses. The Supreme Court's cases, and ours, have articulated a particular vision of the interaction between the Guidelines and the United States Code, and it is a vision that has held constitutional meaning. To reject that view of the Guidelines would not directly "overrule" any Supreme Court holding—a prerogative re-

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[6] *See, e.g., United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) (per curiam) (stating that "we have held that application of the preponderance standard at sentencing generally satifies due process"). The *Watts* Court held that the sentencing judge could consider conduct underlying charges of which the defendant had been acquitted, the same factual scenario at issue in today's case. *See id.* at 156-57, 117 S.Ct. 633.

served unto the Court itself—but it would plainly create an unsettling tension with them.

Blakely may have weakened the long embraced distinction between United States Code maxima and Guidelines ranges, but we cannot conclude that *Blakely*—which explicitly reserved comment on the Guidelines—has abolished the distinction's importance. The sentencing scheme at issue in Blakely, like that involved in *Apprendi*, essentially established two distinct statutory maximum sentences, with the choice between them turning on judge-made findings of fact. In such a circumstance, it makes sense to say that the legislature has effectively created distinct offenses.[7] When the legislature has thus created different offenses, the defendant has a right to have a jury of his peers decide whether he is guilty of all of the elements of the more aggravated offense. *See Apprendi*, 530 U.S. at 476-77, 120 S.Ct. 2348. But the Guidelines do not present such a stark case. We do not believe that the Sentencing Commission can be thought- of as having created for each United States Code section a hundred different *Apprendi* "offenses" corresponding to the myriad possible permutations of Guidelines factors, with each "offense" then requiring jury findings on all of its (Guidelines-supplied) elements. Given the nature of the Guidelines, we think the better view—and one that respects the prior decisions of both the Supreme Court and this court—is that the relevant "offenses" and "maximum punishments" are those defined and authorized by Congress in the United States Code. Judicial findings under the Guidelines that set sen-

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[7] *See Ring*, 536 U.S. at 609, 122 S.Ct. 2428 (explaining that the judges finding of "an aggravating circumstance necessary for imposition of the death penalty . . . operates as the functional equivalent of an element of a greater offense" (internal quotation marks omitted)), *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348 (observing that the effect of the hate-crime enhancement was "to turn a second degree offense into a first-degree offense").

tences within that authorized range there-fore do not offend the Constitution.

The Supreme Court might later decide that *Blakely* is broad enough to sweep away any distinction between the federal Guidelines and the statutes that the Court addressed in *Apprendi, Ring, and Blakely*; the peculiar nature of the Guidelines might not serve to save them from the fate of the statutes involved in those cases. *Cf. Blakely*, at 1249-50 (O'Connor, J., dissenting). Nonetheless, considering the entire matrix of Supreme Court and circuit precedent, we adhere to the position that the Guidelines do not establish maximum sentences for *Apprendi* purposes. In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response.

B. *Drug-quantity findings*

In light of our conclusion that *Blackely* does not apply to Pineiro's case, the sentencing judge's factual findings regarding drug quantities are not problematic under governing law. The Guidelines direct the judge to impose a sentence based not only on the conduct reflected in the verdict but also on other related conduct. *See* U.S.S.G. § 1B1.3; *Edwards*, 523 U.S. at 513-15, 118 S.Ct. 1475. That was the proper approach in this case, notwithstanding the fact that the jury specifically acquitted Pineiro of the large drug quantities later found by the judge. *See Watts*, 519 U.S. at 152-57, 117 S.Ct. 633 (holding that the sentencing judge may consider drug quantities of which a defendant has been acquitted).

C. *"Organizer or leader" enhancement*

The district court imposed a four-level enhancement under U.S.S.G. § 3B1.1 based on its conclusion that Pineiro acted as

an "organizer or leader" of a criminal activity. Pineiro objected on the ground that the evidence did not support such a finding. We review the district court's interpretation and application of the Guidelines de novo and its underlying factual findings for clear error. *United States v. Cabrera*, 288 F.3d 163, 168 (5th Cir.2002). A finding of fact is clearly erroneous if, based on a consideration of all the evidence, we are left with the definite and firm conviction that a mistake has been made. *Id.*

In deciding whether to impose the enhancement, the court is to consider the following factors: (1) the exercise of decisionmaking authority, (2) the nature of the defendant's participation in the commission of the offense, (3) the recruitment of accomplices, (4) any claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing, (6) the nature and scope of the illegal activity, and (7) the degree of control or authority exercised over others. U.S.S.G. § 3B1.1, cmt. n.4.

Pineiro argues that the district court erred in applying the enhancement because the evidence showed only that he sold a substantial amount of drugs to his accomplices, not that he acted as a leader of the enterprise. As he points out, several circuits have held that a buyer-supplier relationship is insufficient to qualify for the "organizer or leader" sentence enhancement. *See United States v. Sayles*, 296 F.3d 219, 225 (4th Cir.2002) (citing cases). This record, however, discloses evidence that goes well beyond a mere buyer-seller relationship between Pineiro and his co-conspirators. The evidence permits the conclusion, for instance, that Pineiro directed and paid several couriers, including a courier who acted for a co-conspirator. The general character of the evidence, as a fact-finder could view it, is that Pineiro oversaw the logistics of a drug-distribution scheme in which he had drugs delivered from Mexico to his property in Texas and then acted as the exclusive supplier to several co-conspirators in Louisiana

over the course of several years. The evidence here is thus not unlike that in past cases in which we have upheld the organizer enhancement. *See United States v. Cooper*, 274 F.3d 230, 246-47 (5th Cir.2001); *United States v. Castillo*, 77 F.3d 1480, 1493 (5th Cir.1996). Further, our precedents permit the district judge to consider the quantity of drugs supplied as one factor among others in considering the organizer enhancement, *see United States v. Valencia*, 44 F.3d 269, 273 (5th Cir. 1995), and, on the basis of the discourt's factual findings, a subs amount of drugs was indeed involved.[8]

The evidence was conflicting on many issues, but we cannot say that we are left with a firm conviction that a mistake has been made. Therefore, there was no clear error in imposing the enhancement.

III. CONCLUSION

For the foregoing reasons, the defendant's sentence is AFFIRMED.

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[8] Pineiro also argues that, even if the district judge's factual findings are not clearly erronenous considering the record as a whole, we must nonetheless vacate and remand for further findings because the district judge legally erred in imposing the enhancement solely on the basis of the PSR's conclusion that Pineiro was a "supplier of drugs." But the same paragraph of the PSR also stated more broadly that Pineiro was "responsible for the distribution" of a large amount of drugs, and other portions of the PSR (which the district court adopted) provided a factual basis for the organizer enhancement. *Cf. Valencia*, 44 F.3d at 272-73 (rejecting an argument similar to Pineiro's).

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 21, 2004

Charles R. Fulbruge III
Clerk

Tel. 504-310-7700
600 Camp Street
New Orleans, LA 80130

No. 03-10615
USDC No. 3:02-CR-243-ALL-G

USA,

v.

ASHLOCK.

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Dawn Shulin, Deputy Clerk
504-310-7658

Mr. Frederick W. Addison III
Mr. John Andrew Drennan

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed SEP. 21, 2004]

No. 03-10615

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

WALTER BRYAN ASHLOCK,
Defendant–Appellant.

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 08/03/04, 5 Cir., _____, F.3d _____)

Before KING, *Chief Judge*, and BARKSDALE, and PICKERING, *Circuit Judges*.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 351, the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges

who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Denise King
United States Circuit Judge

Judge Clement did not participate in the consideration of the petition for rehearing en banc.

REHG-17a